

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NOS. APP-96-1 RPU-96-8
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ORDER REGARDING CONTRACT PROVISIONS

(Issued April 15, 1999)

On June 27, 1997, the Board issued an “Order Approving Settlement, Granting Waivers, And Requiring Additional Information” (the Order) in Docket Nos. APP-96-1 and RPU-96-8 (the Combined Dockets). In the Order, the Board approved a proposed settlement of issues relating to an alternative electric pricing plan proposed by MidAmerican Energy Company (MidAmerican) and a rate review proceeding initiated by the Consumer Advocate Division of the Department of Justice (Consumer Advocate). As a part of a settlement approved by the Board, the Board permitted MidAmerican to use part of an agreed-upon \$33.7 million rate reduction to negotiate individual contract prices for certain customer classes. Specifically, the Board stated: “Commercial and small general service customers will have \$4 million available for customer savings/price reductions in pilot projects such as unbundled pricing retail access or in negotiated individual contract prices for customers within the class. Industrial and large general service customers will have \$6 million available.” Order at page 6.

In approving this portion of the settlement, the Board recognized various issues associated with negotiated individual customer contracts, including the

possible use of long-term contracting. Order at pages 16-18. The Board addressed these issues by requiring MidAmerican to file certain information to permit monitoring of the pilot project and by requiring that MidAmerican provide customers with a copy of the Board's Order as a part of any negotiations.

As a result of questions received from some of MidAmerican's customers during the contracting process, on December 15, 1998, the Board directed MidAmerican to file additional information regarding the terms and conditions that MidAmerican was offering and accepting. Specifically, MidAmerican was directed to file with the Board: (a) any and all standard contract forms it presented or offered to customers as a part of any negotiated-price contracts and (b) any and all nonstandard terms and conditions that MidAmerican included in any negotiated-price contracts that have been executed, along with (c) a narrative summary or table showing the number of customer contracts that have included each standard or nonstandard clause.

On January 15, 1999, MidAmerican filed with the Board approximately 30 draft contracts representing the general terms and conditions of the initial offers MidAmerican made to its customers. The contracts were divided into three broad categories, identified by MidAmerican as Industrial and Commercial Contracts ("Industrial contracts"), Segment contracts, and General Business contracts. The Industrial contracts included 22 separate draft agreements, reflecting various proposals MidAmerican made to its larger customers. Ultimately, each industrial contract was the result of individual negotiations with the customer. The Segment contracts represented proposals made by MidAmerican to an intermediate group of

customers, those of sufficient size to justify at least a limited degree of individual negotiations. MidAmerican filed two draft segment contracts (one of which was erroneously identified as General Business Agreement Type 4). Finally, the General Business contracts included three draft agreements. These were more in the nature of form contracts, presented to smaller customers by means of a broad-based mailing. Due to the smaller size of these customers, few if any of these contracts were the subject of individualized negotiation.

After review of the draft contracts, MidAmerican and Consumer Advocate were contacted regarding certain provisions in those contracts. One concern was that certain provisions of the various contract drafts, if included in the final agreement, could be in violation of the filed rate doctrine or be at odds with possible electric retail customer choice legislation.

Rather than engage in litigation over the scope of approvals by the Board in the Order and a subsequent proceeding involving the APP contracts, MidAmerican has agreed, without admitting any wrongdoing, to waive certain provisions included in the contracts, as will be described below. These waivers will not detract from any customer rights in the contracts. In each case, MidAmerican's waiver will add to the customer's rights under the contract and will cause those rights to conform to the terms and conditions of MidAmerican's existing and future tariff.

1. Termination Fees And Liquidated Damages Clauses

The General Business contracts include provisions, variously described as "Termination Fees" or "Liquidated Damages" clauses, that purport to require a MidAmerican electric customer to make a payment to MidAmerican if the customer,

for any reason, ceases to take service under the contract. Concern was expressed about these provisions, which were not the subject of individualized contract negotiations. MidAmerican has agreed to waive these provisions for all General Business contract customers in the following manner: MidAmerican will (a) waive any exit fees or liquidated damages in the event the customer ceases taking service due to a sale or transfer of a facility or the customer chooses to close the facility for any reason and (b) limit all other exit fees or liquidated damages to the lesser of (1) the difference between the contract rate and the normal tariff rate during the shortened term of the contract or (2) the fees specified in the contract.

2. "Open Season" Lobbying Restriction And Waiver

Many of the Industrial and Segment contracts include two provisions, often (but not always) identified as Articles 11.2 and 11.4. Article 11.2 typically restricts the customer's right to lobby for contract changes as a part of any change in the existing law applicable to the agreement, using language similar to this:

Customer Assistance in Gaining Regulatory Approvals.
Customer agrees to assist MidAmerican in the process of gaining any and all regulatory approvals, and shall take no direct or indirect action to encourage any legislative or regulatory agency to change or terminate this Agreement.

In most of the draft agreements, Article 11.4 then provides that the customer will not exercise any discretionary termination rights that may be granted to the customer in connection with electric industry restructuring, using language like the following:

Waiver. The Parties understand and agree that the electric industry may be restructured during the Primary

Term of this Agreement in a manner which may modify MidAmerican's exclusive service area or may provide [Customer] the ability to purchase electric services from a source other than MidAmerican ("Industry Restructuring"). Accordingly, except for a termination of the Agreement as provided for in this ARTICLE XII, neither Party shall exercise any discretionary authority it may obtain to terminate this Agreement prior to the end of the Primary Term. The Parties hereby explicitly waive all rights that they may subsequently be granted to end this Agreement prior to the end of the Primary Term, which may directly or indirectly arise as a result of any electric industry restructuring.

(Sample language taken from Industrial contract Form 3.) In other words, Article 11.2 prohibits some contract customers from lobbying the Iowa legislature or the Board for an "open season" or "fresh look" to permit termination of existing contracts as a part of any industry restructuring, while Article 11.4 requires the customer to waive, in advance, any such rights the customer may ultimately receive. The concern with these types of clauses is that if they are included in final, executed contracts, particularly in the context of smaller customers, they may have an impact on smaller customers' ability to aggregate into larger, more desirable market entities in a restructured Iowa marketplace.

MidAmerican believes that customer commitments not to lobby for termination of the contract or not to exercise any statutory right to terminate the contract simply amount to explicit, bargained-for commitments that the customer will in good faith adhere to the agreed-upon contract for electric service. Since MidAmerican is obligated to supply energy at the negotiated price for the term of the contract, MidAmerican believes it is fair for the customer to have a reciprocal obligation to purchase the energy. However, while MidAmerican does not agree with the

concerns, and without admitting wrongdoing, MidAmerican has agreed to waive any right it may have to enforce those provisions of Articles 11.2 and 11.4 that (a) would prevent a contracting customer from encouraging legislative or regulatory change that would give the customer the right to terminate the agreement or (b) would prevent the customer from exercising any discretionary authority it may obtain to terminate the agreement prior to the end of the primary term.

3. Contract Rates That May Exceed Applicable Tariff Rates

Another area of concern arising from draft contracts is the occasional use of rates for electric service that are higher than MidAmerican's current tariff rates. For example, the Segment contract identified as Type 4 specifies an escalating contract rate that, in Year 6, reaches 102% of the applicable tariff rate. In another example, Article 3.2 of the other Segment contract form provides that if the parties are unable to agree upon the rate for any incremental service under the agreement, then the rate will be the "greater of MidAmerican's applicable tariffed rate or the Base Price specified in the agreement." Other contracts listed the contract rates in an Exhibit B, which was not provided to the Board as a part of the January 15, 1999, filing. However, the rates from the various Exhibits B were included in MidAmerican's February 2, 1999, filing in Docket No. IOWA ADMIN. CODE 199-20.14(4). Those rates show that some of the contract rates will exceed tariff rates at some point in time. Finally, any of these contract rates could exceed MidAmerican's tariff rates if those rates are reduced at any time during the term of these contracts.

Another concern was that these over-tariff clauses could be a violation of IOWA CODE § 476.5, which prohibits public utilities subject to rate regulation from charging greater (or lesser) compensation for their services than the charges specified in their tariffs. The reduced rate contracts contemplated by the Board in these Combined Dockets would comply with this statute under the Board's flexible rate rules, IOWA ADMIN. CODE 199-20.14, and MidAmerican's tariff provisions filed pursuant to those rules, but there does not appear to be any clear corresponding authorization for contract rates above tariff. Moreover, many of the contract forms specify rates that are presently equal to or below MidAmerican's existing applicable tariff rates, but those contract rates may exceed the applicable tariff rates in the future.

Although MidAmerican does not agree with the concerns expressed, and without admitting any wrongdoing, MidAmerican has agreed to waive any and all contract rates that exceed the applicable tariffed rate that the customer would otherwise be using at the time the service is provided. In other words, each contracting customer would continue to receive service under the contract at the lower of the negotiated contract rate or the then-applicable tariff rate. In situations in which the contract rate design is changed from the tariff rate design, MidAmerican will determine the lowest overall customer bill on a prospective basis by applying the customer's usage during the prior 12-month contract year against the applicable contract and tariff rates. In other words, for each contract year every contracting customer would continue to receive service under the contract at the lower of the negotiated contract rate or the then-applicable tariff rate. In situations in which the

contract rate design changed from the pre-contract tariff rate design, MidAmerican will determine the lower overall price on a prospective basis by applying the customer's usage during the prior 12 month contract year against the then-applicable contract rates versus the then-applicable tariff rate. The proper tariff rate shall be the current rate at the time of calculation for the tariff that the customer had been served under prior to executing the contract. In the event that the customer's usage makes the customer no longer eligible for that tariff rate, for calculation purposes MidAmerican shall use an appropriate applicable rate. This requirement shall remain in effect as long as MidAmerican continues to have applicable rate regulated bundled retail rates.

4. Future Contracts

Without admitting any wrongdoing, MidAmerican has agreed that it will not include any of the previously-described terms in any new electric service agreements or in any replacement agreements it may negotiate with the affected customers. In the event that the electric industry in Iowa is restructured, and if that restructuring includes an opportunity for competitive electric service providers to contract with customers, MidAmerican will be permitted to contract with its customers subject to the same restrictions, and with the same rights, as other electric service providers.

5. Notice To Affected Customers Prior To Automatic Contract Extension

The General Business contracts typically specify a Primary Term of five years from the date of initial service under the agreement. These contracts then provide that, after the Primary Term, the contract continues on a year-to-year basis unless

either party provides the other party with written notice of termination 90 days prior to the anniversary date of initial service. This raises the concern that many customers signing the General Business contracts may not recall a requirement that they must give 90 days' notice to terminate a five-year contract and, as a result, they may inadvertently experience an automatic one-year extension of their agreement.

MidAmerican has agreed to send each of these customers a written notice, at least 150 days in advance of the end of the Primary Term, to inform the customers of their pending right to terminate the agreement at the end of the Primary Term.

6. Notice To Customers of MidAmerican Waivers

Finally, MidAmerican has agreed to notify each of the affected customers of its decision to waive certain clauses in the electric service agreements, as described above. The notice will be in writing and will be by separate mailing, not included with the customer's bill for service. MidAmerican will send the form letter or letters in a form substantively identical to the attached Appendix A. Copies of the letter shall be sent to the affected customers within 45 days after issuance of this order.

IT IS THEREFORE ORDERED:

1. The waivers of contract terms described in the body of this order and agreed to by MidAmerican Energy Company are found to be acceptable to address the concerns described above.

2. MidAmerican shall send the notices as provided in Item 6, above, to the affected customers within 45 days of the date of this order.

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/s/ Allan T. Thoms

/s/ Emmit J. George, Jr.

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

/s/ Paula S. Dierenfeld

Dated at Des Moines, Iowa, this 15th day of April, 1999.

Dear _____:

As you know, your company entered into a long term Energy Services Agreement with MidAmerican Energy Company, effective (insert date). This activity was permitted by the Iowa Utilities Board as part of its "Order Approving Settlement, Granting Waivers, And Requiring Additional Information" in Docket Nos. APP-96-1 and RPU-96-8, subject to various procedural requirements outlined in the Settlement document, which was provided to you.

In response to concerns recently raised by the Iowa Utilities Board regarding these agreements, MidAmerican Energy Company has agreed to waive certain provisions, as described below. These waivers in no way detract from your rights under your agreement; in fact your rights increase as a result.

Provisions Waived

- _____
- _____
- _____

All other terms and conditions of your agreement remain in force.

If you have any questions regarding the waivers please do not hesitate to contact me at (insert phone number

Sincerely,

Insert Name and Title or Department